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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RACHAEL L., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

C.L.,

Defendant and Appellant.

D054059

(Super. Ct. No. J516340)

APPEAL from a judgment of the Superior Court of San Diego County, Carol
Isackson, Judge. Affirmed.

C.L. appeals a judgment terminating his parental rights to his daughter, Rachael L.
He contends the juvenile court violated his right to due process and his rights under Penal
Code section 2625 and abused its discretion by not continuing the Welfare and

Institutions Code¹ section 366.26 hearing so he could be present to testify. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2006, 18-month-old Rachael was taken into protective custody because her mother, Christine L., abused alcohol. The San Diego County Health and Human Services Agency (the Agency) petitioned on Rachael's behalf under section 300, subdivision (b), alleging police had found Christine in an intoxicated and incoherent state, walking with Rachael. At the time C. was incarcerated.

The juvenile court found the allegations of the petition to be true, declared Rachael a dependent child, placed her in foster care and ordered the parents to comply with their services plans.

C. has a long criminal history, including arrests for hit and run, abuse of a family member, disorderly conduct, assault and battery. He also has problems with mental illness. Christine said she and C. were alcoholics and their relationship had included domestic violence. After C.'s release from custody in March 2007, he began services, including therapy and psychiatric services and outpatient substance abuse treatment. His parole officer reported C.'s parole conditions required him to drug test and have domestic violence treatment.

At the six-month review hearing on March 20, 2007, the court found the parents had made some progress with their case plans and continued Rachael in out-of-home

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

care. It authorized expanded visits with Rachael for Christine, while continuing supervised visits for C. In June Rachael was placed with Christine for a 60-day trial visit, but in August she was returned to her foster home because Christine resumed using alcohol and left her sober living facility.

C. had been hospitalized for medical evaluations in April and August 2007. He was diagnosed with a bipolar manic depressive disorder. He had successful supervised visits with Rachael, but was belligerent toward the visitation monitor during one visit. The social worker reported Christine and C. had requested restraining orders against each other, and Christine had filed for divorce. They then reconciled for a time, but in September 2007 Christine reported C. had beaten her up. He was charged with spousal battery. Both parents were dropped from their domestic violence programs because they showed no progress. The social worker reported C. was arrested on January 26, 2008, for being drunk in public, vandalism and obstructing an officer.

At the 18-month hearing on April 3, 2008, the court found reasonable services had been provided, but returning Rachael to parental custody would cause a substantial risk of detriment. It terminated services and set a section 366.26 hearing.

The social worker reported that on May 6, 2008, C. requested a visit with Rachael. The social worker noted C.'s speech was slurred and his eyes were bloodshot that day. He cautioned C. that he would need to be sober for the visit. That afternoon at the visit, Rachael ran to C. and they played together. C. cried at the end of the visit. Rachael began to cry too, but then willingly sat with the social worker. C. was arrested the next day for fighting in a public place and obstructing a public official. The juvenile court

hearing that had been set to address the Agency's request to place Rachael out of state with paternal relatives was continued to May 12. On May 12 C. appeared with counsel. The court ordered Rachael placed with paternal relatives in Oklahoma² and ordered C. to return for the section 366.26 hearing that was scheduled for July 29.

On July 29, 2008, the section 366.26 hearing was set for September 17. On September 4 C.'s counsel requested the court change the date of the hearing because C. was not scheduled to be released from custody until the week after the scheduled hearing date. Counsel said she had prepared orders to produce C. for the September 17 hearing, but believed he would waive his appearance. The Agency's counsel objected to a continuance, noting the social worker's last day of employment was September 18, and he would then be moving out of state. The court denied the request for a continuance.

The social worker reported he had verified that C.'s counsel had filed orders to produce C. from custody for the September 17 hearing. He reported C. was not able to have telephone contact with Rachael while he was incarcerated, but he had sent her letters.

At the hearing on September 17, C. was not present, but was represented by counsel. C.'s counsel stated C. had waived his appearance at the hearing before he learned the court had denied his request for a continuance. After considering the evidence and argument by counsel, the court found Rachael was likely to be adopted if

² The social worker reported Rachael was highly adoptable and the paternal relatives were committed to adopting her. In addition, there were 25 approved adoptive families in San Diego County interested in adopting a child with her characteristics.

parental rights were terminated and none of the statutory exceptions to termination of parental rights and adoption applied. It terminated parental rights and referred the case for adoption.

DISCUSSION

C. contends the juvenile court violated his right to due process and his rights under Penal Code section 2625 and abused its discretion by not continuing the section 366.26 hearing so he could be present to testify. The Agency argues the appeal should be dismissed because C. did not raise in the juvenile court the issues he argues here nor did he renew his motion for a continuance at the September 17 hearing. We exercise our discretion to treat his arguments on their merits. Doing so, we hold he has not shown error or prejudice by the court denying his request for a continuance.

"[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418, quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) "The essence of due process is fairness in the procedure employed. . . ." (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.)

C. was provided proper notice of the section 366.26 hearing. He was personally served with written notice as required by section 294, subdivision (f)(3). The notice informed him that at the hearing the Agency would be requesting the court terminate his parental rights and order adoption as the permanent plan for Rachael. Also, he was

present in court when the court scheduled the section 366.26 hearing. The court advised him of the hearing date and ordered him to return for the hearing.

Penal Code section 2625, subdivision (d) provides in part:

"No proceeding may be held under . . . Section 366.26 of the Welfare and Institutions Code . . . without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institutions, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding."

In *In re Jesusa V.* (2004) 32 Cal.4th 588 (*Jesusa V.*), the California Supreme Court ruled the word "or" in the statute must be construed to mean "and," thus, "*both* the prisoner *and* the prisoner's attorney must be present. . . ." (*Id.* at pp. 621-622.) The court further found that a harmless error analysis was appropriate if the prisoner did not appear, and in *Jesusa V.*, there was no reasonable probability of a different result had the father been present at the hearing. (*Id.* at pp. 622, 626; See also, *In re Iris R.* (2005) 131 Cal.App.4th 337, 342-343.)

Here, C.'s counsel stated she had prepared two orders to produce C. and that C. was waiving his appearance. The court stated it had received a waiver of C.'s appearance. The written waiver does not appear in the record on appeal, but we presume the juvenile court was presented with a valid waiver when it referred to the waiver and proceeded in C.'s absence. (See *Schmidt v. Superior Court* (1989) 207 Cal.App.3d 56, 62.) C. has not shown a violation of the statute or a denial of due process.

Moreover, there is no reasonable probability the result would have been any different had C. been present at the hearing. The court had a record of the visits C. and

Rachael had together and was informed that, although C. had not been able to talk with Rachael by telephone during his most recent incarceration, he had sent letters to her. C.'s counsel did not present an offer of proof as to what C. would say if he were to attend the hearing, and he does not specify in his arguments any testimony he would have presented to change the result of the hearing.

C. also has not shown the court abused its discretion by denying the motion for a continuance. The juvenile court may grant a continuance only on a showing of good cause. "[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status. . . ." (§ 352, subd. (a).) "Continuances are discouraged [citation] and we reverse an order denying a continuance only on a showing of an abuse of discretion [citation]." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

Counsel indicated C. could not attend because he needed to attend a meeting at the facility where he was incarcerated. The Agency's counsel and Rachael's counsel both opposed the motion to continue the hearing. The Agency's counsel indicated the social worker's last day of employment with the Agency was the day after the scheduled hearing and then the social worker planned to move out of state. The court commented the calendar for contested hearings was very full and the next available date would not be for one to two months. It found C.'s counsel had not shown good cause to delay the hearing. This decision was well within the court's discretion. C. has not shown error.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.